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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1947

No. 175

State of California and Ben H. Brown Domiciliary Administrator, Petitioners, v Michigan State Board of Escheats, and Edward J. O'Donnell, Ancillary Administrator. In the Matter of the Estate of Max Rapoport also known as Max Rappaport, Deceased.	On application for certiorari to the Supreme Court of the State of Michigan.

Brief Opposing Petition for Certiorari

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Brief Opposing Petition for Certiorari

I

Opinion of the Court Below.

The opinion of the court below is correctly reported in 317 Mich. 291, as stated on p. 3 of the Petition.

II

Counter-Statement of the Case.

(Figures in parentheses refer to pages of the printed record unless the context clearly indicates otherwise.)

Not even a hint that a federal question is raised appears in the appeal of Ben H. Brown, domiciliary administrator of decedent, and State of California, appellants, to the circuit court of Wayne County, Michigan, from the Probate Court of the County of Wayne, for the five reasons set forth therein. (19)

And further in the reasons and grounds of appeal from the circuit court of the County of Wayne, to the Supreme Court of Michigan (38) and which is required by Michigan Court Rules, Rule 66, Sec. 2, which provides in part:

> " • • • and the proposed bill of exceptions or settled case, together with the statement of reasons and grounds of appeal and the notice for settlement, shall be served on the appellee at least 4 days before the time for such settlement • • • ,"

is there a clear cut statement that a federal question is raised.

Section 3 of said Rule 66 provides:

> "Reasons and grounds of appeal shall be stated in the form heretofore employed in assignments of error, but no statement shall be deemed insufficient if it reasonably informs of the error relied upon. No bill of exceptions or settled case shall be signed unless accompanied by such statement of reasons and grounds of appeal, and no errors shall be considered by the Supreme Court that are not included in such statement."

We note that Brief for Domiciliary Administrator and State of California, Appellants in the lower court is made a part of the Record in the case at bar. (42)

As we view it this avails nothing. As said in part in Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States, Sec. 74, p. 125:

> "It is an established rule that briefs filed in the state courts form no part of the state court record for the purpose of Supreme Court review; and ordinarily they cannot be relied upon to establish that a federal question was raised, even if they are incorporated into the record sent to the Supreme Court * * * ."

III

Jurisdiction.

Counsel for petitioners invoke the jurisdiction of this Court under Article III, Sec. 2 of the Constitution of the United States and under Section 237 of the Judicial Code, as amended (USC Title 28 Sec. 344) because in this case there is drawn in question the validity of a statute of the State of Michigan on the ground of its being repugnant to the Constitution of the United States and the decision of the Michigan Supreme Court, the highest Court of the State in which a decision in the suit could be had, decided in favor of its validity.

The respondents respectfully suggests that jurisdiction should not be assumed by this Court, since the state court did not decide a federal question of substance (Court Rule 38, par. 5 (a)). The questions now presented were not raised in their federal aspect in the trial court (See claim of appeal of Ben H. Brown, domiciliary administrator of decedent, and State of California from the Probate Court of Wayne County to the Circuit Court of Wayne County for the reasons therein set for and to which the appeal shall be limited

(19), and Reasons and Grounds of Appeal from the circuit court of the County of Wayne, Michigan, to the Supreme Court of the State of Michigan (38) and required by Michigan Court Rules, Rule 66, Sections 2 and 3).

Specifically answering the statement of petitioners that they presented the Federal question to the Michigan Supreme Court in their brief, page 5, under the following heading:

"Statement of Questions Involved"

"3. Has Michigan power under the Constitution to take by escheat intangible personal property of a non-resident (42)"

and bearing in mind that briefs filed in the state courts form no part of the state court record for the purpose of Supreme Court review, Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States, Sec. 74, p. 125, supra, the due process clause of the Michigan State Constitution of 1908, Sec. 16, Art. 11, reads as follows:

"No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law,"

this does not in our view properly raise a federal question. As said in part in Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States, Sec. 81, p. 139:

"Where the state constitution contains a due process clause, a claim in the record that 'due process' is violated, without specific reference to the federal Constitution, will be deeemed to refer solely to the state constitution and if the objection made is that the statute of the state is 'unconstitutional,' 'unconstitutional and

> void,' denies 'constitutional rights,' or the like, this is regarded as referring only to the power of the state legislature under the state constitution. • • • "

Counsel for petitioners then say in their brief p. 6, that we then argued that question in our brief to the Michigan Supreme Court, citing federal cases. In this regard Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States, sec. 81, p. 140, says:

> "The mere fact that decisions of the Supreme Court are cited and relied upon in support of an argument advanced in the state court does not, of itself, suffice to show that a federal question was raised. Nor is a federal question deemed to have been sufficiently passed upon by the state court to sustain the jurisdiction of the Supreme Court, where the opinion of the state court, after setting forth the state rule, adds: 'Such principle is fair and just and complies with the construction by the Federal courts of the 'due process' clause of the Fourteenth Amendment'—citing decisions of the Supreme Court."

IV

Respondents' Suggestions as to why jurisdiction should not be assumed.

We disagree with the statement of counsel for petitioners on p. 7 of their brief that the issues in the case at bar have never been decided by this Court.

There is no substantial federal question involved in the case at bar and this is a jurisdictional prerequisite. As stated in Robertson and Kirkham, Jurisdiction of the

Supreme Court of the United States, sec. 22, p. 48, that a record from the state court which will support the jurisdiction of the Supreme Court must show:

(4) That the case presents a substantial federal question;

(5) That the federal question sought to be reviewed was properly raised and preserved in the state courts; and

(6) That the decision of the highest court of the state does not rest upon a state ground which independently and adequately supports the judgment or decree.

Counsel for petitioners complain on p. 7 of their brief that the lower court declined to follow the ruling of the Washington Supreme Court in the case of *In re Lyons Estate,* 175 Wash. 115, relied upon by appellants in the court below, petitioners here, and referred to in the decision of the lower court in 317 Mich. 291, 296. The lower court also quotes with approval on p. 302 of the decision a criticism of the holding in the case of *Re Lyons' Estate,* supra, in 2 Beale, Conflict of Laws, p. 1039, Sec. 309.1.

We have then, as we view it, a decision in the field of the conflict of laws. This Court has said that federal courts must follow the law of the state as to conflict of laws,

Griffin v *McCoach,* 313 US 498, 134 ALR 1462;

Klaxon Co. v *Stentor Electric Mfg. Co.,* 313 US 487.

And the State of California being a litigant in the case at bar the language of Sec. 273, Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States, p. 505, is apt:

> "But the interests of the state, broad as they are, do not authorize it to invoke the decision of the Su-

preme Court upon abstract questions of power as between state and nation, or of rights as between states, without showing prejudicial injury to its quasi-sovereign rights, its proprietary rights, or its rights of physical dominion. Its standing, as representative of its citizens, to challenge the action of other states and their citizens is a limited one * * *."

The power of the legislature to render property of the character here involved subject to escheat in favor of the State is clear,

In re Escheat of Moneys in Custody of United States Treasury, 322 Pa. 260, Id. 326 Pa. 260, affirmed *United States* v *Klein,* 303 U.S. 276;

Cunnius v *Reading School District,* 206 Pa. 469, 471, affirmed 198 U.S. 458;

Security Savings Bank v *State of California,* 263 U.S. 282, 285, 286, 31 A. L. R. 391.

A legislative provision for escheat is a valid exercise of the police power of the state,

Cunnius v *Reading School District,* supra, at p. 469.

And in *United States* v *Klein, Escheator of Commonwealth of Pennsylvania,* 106 F (2) 213, cert. den. 308 U.S. 618, it was held that the state of Pennsylvania may constitutionally escheat unclaimed money deposited in the registry of the United States District Court in Pennsylvania and later covered into the United States Treasury.

In *Anderson National Bank* v *Luckett,* 321 U.S. 233, 240, 151 A.L.R. 824, it was said:

"At common law, abandoned personal property was not subject of escheat, but was subject only to the right

of appropriation by the sovereign as bona vacantia. See 7 Holdsworth, A History of English Law (2d Ed.) 495, 496. Like rights of appropriation, except so far as limited by state law and the Fourteenth Amendment, exist in the several states of the United States. *Hamilton* v *Brown*, 161 U.S. 256; *Christianson* v *King County*, 239 U.S. 356; *Security Savings Bank* v *People of State of California*, 263 U.S. 282, 31 A.L.R. 391; *United States* v *Klein*, 303 U.S. 276."

There is nothing hypnotic in the maxim *mobilia sequuntur personam*. In *Blackstone* v *Miller*, 188 U.S. 189, 204, it was said:

> "When logic and the policy of a State conflict with a fiction due to historical tradition *(mobilia sequuntur personam)* the fiction must give way."

Petitioners of course are bound by the stipulation of facts (16) that decedent died in the City of Los Angeles, California, on July 25, 1943, leaving no will and no heirs, so far as is now known to the parties, and the Inventory (4) showing securities in the National Bank of Detroit, within the territorial jurisdiction of Michigan.

In the case of *Smith* v *Ajax Pipe Line Co.*, 87 F (2) 567, 570, cert. den. 300 U.S. 677, it was said:

> "But that legal principle *(mobilia sequuntur personam)* is not unassailable. It is a court made rule designed to work out practical justice (citations omitted.) Being such, it is pushed no further than the reason for its existence justifies and where justice requires a departure therefrom exceptions are made, both in other fields of law and in the field of taxation (citations omitted.)"

And in *Underwood*, et al v *Phillips Petroleum Co.* (CCA) 155 F (2) 372, 374, it is said:

> "The tendency of modern authority is to depart from the maxim of Roman law '*mobilia sequuntur personam*', recognized by the early decisions. That maxim, by which personal property was regarded as subject to the law of the owner's domicile, grew up in the Middle Ages when movable property consisted chiefly of gold and jewels easily carried by the owner from place to place, or secreted in spots known to him alone, and the result has, in modern times, due to the great increase in the amount and variety of personal property not immediately connected with the owner's person, yielded more and more to the lex rei sitae, the law of the place where the property is kept and used,
>
> *Pullman's Palace Car Co.* v *Pennsylvania*, 141 U.S. 18, 22;
>
> *Hutchison v Ross*, 262 N. Y. 381, 89 A.L.R. 1007;
>
> *First Trust Co. of St. Paul* v *Matheson*, 187 Minn. 468, 87 A.L.R. 478;
>
> *In re St. Paul & K. C. Grain Co.*, 89 Minn. 98."

We respectfully submit that the decision of the lower court, 317 Mich. 291, 304, to the effect:

> "It should be noted that when the escheat law was enacted the doctrine of situs of domicile was in existence in Michigan. We presume that it was the intention of the legislature by the enactment of the escheat law to overrule the doctrine of situs of domicile insofar as escheated estates are concerned. In our opinion the assets involved in the case at bar escheat to the State of Michigan under and by virtue of the Michigan escheat law,"

rests on adequate and independent state grounds, and this Court will not review judgments of state courts that rest on adequate and independent state grounds,

Herb v *Pitcairn*, 324 U.S. 117.

As said in *Freeman* v *Hewit*, 329 U.S. 249, 258:

> "Latin tags like *mobilia sequuntur personam* often do service for legal analysis, but they ought not to confound constitutional issues. What Mr. Justice Holmes said about that phrase is relevant here. 'It is a fiction, the historical origin of which is familiar to scholars, and it is this fiction that gives whatever meaning it has to the saying *mobilia sequuntur personam*. But being a fiction it is not allowed to obscure the facts, when the facts become important. *Blackstone* v *Miller*, 188 U.S. 189, 204.' "

This Court does not seek to review and revise the construction fixed upon a state statute as to a state matter by the court of last resort of the State,

Quong Ham Wah Co. v *Industrial Accident Commission*, 255 U.S. 445, 448.

And in speaking of the construction of state statutes by state courts this Court said in No. 461, October Term, 1946, *Greenough et al* v *Tax Assessors of the City of Newport*, et al., decided by this Court June 9, 1947, not yet officially reported:

> "State courts construe their statutes according to their understanding of state policy and apply them to such situations as their interpretation of the statutory language requires. In so adjudging, they are the final authority upon the meaning of their state law. It is only in circumstances where their judgments collide with

> rights secured by the Federal Constitution that we have power to protect or enforce the federal rights."

Can it be said here that petitioners have been denied rights secured by the Federal Constitution because the lower court concluded that the Legislature of Michigan had changed the common law doctrine of *mobilia sequuntur personam* with reference to the escheat of personal property found within the territorial limits of Michigan without disposition thereof by a last will and testament and without any known heirs? We think not.

And in *Supreme Lodge Knights of Pythias* v *Meyer*, 265 U.S. 30, 32, it is said:

> "Under the settled rule of this Court, declared so frequently and uniformly as to have become axiomatic, we must accept this decision of the highest court of the State fixing the meaning of the state legislation, as though such meaning had been specifically expressed therein."

We think that other principles established by this Court bar review here by this Court. It is well established that the Constitution of the United States does not guarantee uniformity of decision as to facts by the courts of two sovereign States,

> *Milwaukee Elec. Ry. & Lt. Co.* v *Wisconsin*, 252 U.S. 100, 106;
>
> *Tracy* v *Ginzberg*, 205 U.S. 170;
>
> *Central Land Co.* v *Laidley*, 159 U.S. 103.

The most that it does is to guarantee due process of law in arriving at such decision, and to that end this Court may re-examine the factual situation to ascertain whether the

conclusion of the state court had adequate evidence to support it,

Johnson Oil Co. v *Oklahoma*, 290 U.S. 158.

The right to escheat property certainly is in the same category, we think, as the right to succeed to ownership of realty and personalty which are peculiarly matters of state law,

Harris v *Zion's Savings Bank & Trust Co.*, 317 U.S. 447, 450.

It is firmly established that when parties have been fully heard in the regular course of judicial proceedings an erroneous decision of the state court does not deprive the unsuccessful party of his property without due process of law within the Fourteenth Amendment of the Constitution of the United States,

Bonner v *Gorman*, 213 U.S. 86, 91.

Neither the Fourteenth Amendment nor the full faith and credit clause require uniformity in the decisions of the courts of different states as to the place of domicile, where the exertion of state power is dependent on domicile,

Worcester County Trust Co. v *Riley*, 302 U.S. 292, 299;

Standard Oil Co. v *Missouri*, 224 U.S. 270.

The decision of a state court involving nothing more than the ownership of property, with all parties in interest before it, cannot be regarded by the unsuccessful party as a deprivation of property, without due process of law, simply because its effect is to deny his claim to own such property. The Fourteenth Amendment did not impair the authority of the States to determine finally, according to their settled

usages and established modes of procedure, such questions, when they do not involve any right secured by the Federal Constitution or by any valid act of Congress, or by any treaty,

Tracy v Ginzberg, 205 U.S. 170.

The basis of the non-federal ground rule, i.e., the refusal of the Court even to review for the purpose of deciding the federal question a judgment of a state court which rests upon an adequate state ground is a self-imposed limitation announced originally in *Murdock* v *City of Memphis*, 20 Wall. 590 at 635. The reason for this rule has rarely been articulated, but a recent decision of the Court, *Herb* v *Pitcairn*, 324 U.S. 117, 125, has sought to place it upon two considerations: first, " . . . in the partitioning of power between the state and federal judicial systems," and secondly, in "the limitations on our own jurisdiction."

As we have stated above that this Court has said that federal courts must follow the law of the state as to conflict of laws and the lower court declining to follow the case of *In re Lyons' Estate*, supra, dealing with a similar problem as here involved in the field of conflict of laws and relied upon by petitioners in the lower court for a reversal of the trial court judgment, and the lower court construing a state statute changing the common law rule of *mobilia sequuntur personam* with reference to the escheat of intangibles within the territorial limits of Michigan, no substantial federal question was raised either in the trial court or in the lower court and preserved there for review here as appears in reasons for appeal to the circuit court for the county of Wayne from the Probate Court for the County of Wayne, (19) and in Reasons and Grounds of Appeal on appeal to the Supreme Court of Michigan from the circuit court for the county of Wayne, Michigan. (38)

V

Conclusion.

The State of Michigan respectfully submits that the petition for certiorari should be denied; or, in the alternative, that the judgment of the Supreme Court of Michigan should be affirmed.

Respectfully submitted,

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